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In the Supreme Court of the United States

OCTOBER TERM, 1988

IN RE JACK B. SOLERWITZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an attorney who prosecuted 142 frivolous appeals, notwithstanding repeated warnings from the court that such conduct would subject him to sanctions, engaged in "conduct unbecoming a member of the bar" within the meaning of Fed. R. App. P. 46(b) and was therefore properly subjected to the sanction of a one-year suspension from practice before that court.

2. Whether an attorney subjected to disciplinary proceedings under Fed. R. App. P. 46(b) is entitled to have the decision made by a tribunal other than the court before which the misconduct occurred.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	20
Appendix A	1a
Appendix B	4a
Appendix C	5a
Appendix D	7a

TABLE OF AUTHORITIES

Cases:

Adams v. *Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4, 5

Amodeo v. *Department of Transportation, FAA*, 788 F.2d 1549 (Fed. Cir.), cert. denied, 479 U.S. 849 (1986) 5

Anderson v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4

Bithoney, In re, 486 F.2d 319 (1st Cir. 1973) 15, 17

Bloom v. *Illinois*, 391 U.S. 194 (1968) 17

Brown v. *Department of Transportation, FAA*, 735 F.2d 543 (Fed. Cir. 1984) 13

Burr, Ex parte, 22 U.S. (9 Wheat.) 529 (1824) 17

Campbell v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984) 4

Chandler, In re, 450 F.2d 813 (9th Cir. 1971) 17

Des Vignes v. *Department of Transportation, FAA* 791 F.2d 142 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986) 5, 6, 7

DiMasso v. *Department of Transportation, FAA*, 735 F.2d 526 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4

Cases—Continued: Page

Dorrance v. *Department of Transportation, FAA*, 735 F.2d 516 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4
Garland, Ex parte, 71 U.S. (4 Wall.) 333 (1867) 17
Martel v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4
Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971) 18
Moylan v. *Department of Transportation, FAA*, 735 F.2d 524 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 4, 13
Novotny v. *Department of Transportation, FAA*, 735 F.2d 521 (Fed. Cir. 1984) 3
Offutt v. *United States*, 348 U.S. 11 (1954) 18
Schapansky v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) 2, 4, 13
Snyder, In re, 472 U.S. 634 (1985) 16, 17, 18
Tatum, In re, 587 F.2d 682 (5th Cir. 1979) 17
Taylor v. *Hayes*, 418 U.S. 488 (1974) 17-18
Young v. *United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987) 17

Statute and rules:

28 U.S.C. 46(b) 3
Fed. Cir. R.:
Rule 13 5
Rule 13(a) 6
Fed. R. App. P.:
Rule 28 5
Rule 28(a)(3) 6
Rule 30(b) 19
Rule 38 ..... 7, 11, 19
Rule 46 16
Rule 46(b) 2, 8, 10, 11
Fed. R. Civ. P.:
Rule 11 19
Rule 16(f) 19

Rules—Continued: Page

Model Rules of Professional Conduct (1983):
Rule 1.2 15
Comment 15
Rule 1.3 ..... 15, 16
Comment 15, 16
Rule 3.1 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A163-A201) and its opinion denying petitioner's motion for reconsideration (Pet. App. A202-A206) are reported at 848 F.2d 1573.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1988, and a petition for reconsideration was denied on July 20, 1988 (Pet. App. A202-A206). The petition for a writ of certiorari was filed on September 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an attorney who was found by the court of appeals to have filed more than 140 frivolous appeals from decisions of the Merit Systems Protection Board (MSPB),

after having been repeatedly warned by the court that such conduct would be improper and would subject him to sanctions. In these distinct proceedings, the court of appeals found that petitioner's litigation practices constituted "conduct unbecoming a member of the bar" within the meaning of Fed. R. App. P. 46(b), and it therefore suspended him from practice before that court for one year.

1. More than 11,000 air traffic controllers were removed from their positions for having participated in the illegal nationwide strike called by the Professional Air Traffic Controllers Organization in August 1981. More than 10,000 of the former controllers appealed their removals to the MSPB, and more than 4,600 filed petitions for review of adverse MSPB decisions in the United States Court of Appeals for the Federal Circuit (Pet. App. A165-A166).[1]

By order dated February 24, 1983 (App. A, *infra*, 1a-3a), after consultation with counsel who elected to participate, the court of appeals designated seven of the appeals raising controlling legal issues as "lead cases." It scheduled those cases for expedited briefing, oral argument and decision, and suspended proceedings in the remaining appeals by directing the clerk to withhold docketing. The lead cases consisted of the two cases already pending before the court that had received full MSPB review and five others then pending before the MSPB that the MSPB itself had designated as lead cases.[2]

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[1] A discussion of the strike and the litigation it spawned may be found in *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

[2] Because some of the petitioners involved in the seven lead cases retained different counsel on appeal, the original seven cases ultimately resulted in eleven different lead cases before the court of appeals. See Pet. App. A5-A7 n.3.

The court believed that it was appropriate to "determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases" (App., *infra,* 2a). See Pet. App. A166-A167. Petitioner was counsel in one of the lead cases (*id.* at A167; see *Novotny* v. *Department of Transportation, FAA,* 735 F.2d 521 (Fed. Cir. 1984)), and he also represented between 800 and 1000 former controllers before the MSPB and filed petitions for review in the court of appeals on behalf of 736 individuals (*ibid.*).[3]

On May 18, 1984, a five-judge panel of the court of appeals decided the lead cases. See 28 U.S.C. 46(b). On the same date, the court sent notices to counsel and petitioners in all pending air traffic controller appeals, enclosing copies of the lead-case decisions and stating that counsel and the petitioners would be notified upon "final disposition" of the lead cases and would be requested at that time to state their intentions with respect to maintaining their appeals (App. B, *infra,* 4a). Counsel and petitioners were cautioned about the impropriety of maintaining frivolous appeals and were furnished with citations to decisions in which the court below had imposed sanctions for such conduct. *Ibid.;* see Pet. App. A167-A168.

In a notice dated December 10, 1984, the court of appeals informed all counsel and petitioners in the pending controller cases that this Court had denied review in the lead cases in which certiorari petitions were filed and that mandates had been issued in those cases to the MSPB

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[3] Petitioner's standard fee was $750 for representation in administrative proceedings through the regional level of the MSPB and $2500 for all subsequent appeals, although petitioner apparently waived that fee for some of his clients. Pet. App. A23-A24 & n.7, A175.

(App. C, *infra*, 5a-6a).[4] Each recipient of the notice was informed that the suspension of non-lead cases would remain in effect until January 10, 1988, and that before that date, the recipient must either withdraw his then-present petition for review or file a renewed petition; if the recipient did neither, the pending petition would be dismissed. The court also once again warned counsel and petitioners of the impropriety of maintaining frivolous appeals. Finally, the notice informed the recipient that if a new petition was filed on or before January 10, 1985, the appeal would be docketed on the date of receipt and the petitioner's brief would be due 60 days thereafter. *Ibid.*; see Pet. App. A168-A169.[5]

2. a. Petitioner had initially filed a total of 154 petitions for review on behalf of the 736 former controllers whom he represented (Pet. App. A167). After the lead cases were concluded and the suspension lifted, petitioner filed renewed petitions for review in all of those cases (*id.*

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[4] Petitions for writs of certiorari were denied in *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984); *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Dorrance* v. *Department of Transportation, FAA*, 735 F.2d 516 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *DiMasso* v. *Department of Transportation, FAA*, 735 F.2d 526 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); and *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

[5] On July 12, July 31, and August 30, 1985, the court again advised all counsel to review the propriety of maintaining their appeals in light of the need to avoid abuse of the judicial process resulting from frivolous appeals (Pet. App. A8).

at A10). Petitioner's three-person law firm had difficulty in meeting the court's 60-day deadline for filing briefs in that large number of cases, although petitioner at the same time filed motions to exceed the 50-page limit for briefs under Fed. R. App. P. 28 and Federal Circuit Rule 13, which were denied (*id.* at A10-A11). Petitioner also failed to file an appendix in 51 of the cases within the time allowed by the court, even though the court granted one extension of time (*id.* at A12-A14).

b. On May 2, 1986, the court of appeals decided *Des Vignes* v. *Department of Transportation, FAA*, 791 F.2d 142 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986), one of petitioner's air traffic controller cases.[6] The court first reviewed each of petitioner's arguments and found them to be either patently frivolous or foreclosed by decisions that no reasonable attorney could expect to be overturned, modified, or withdrawn (791 F.2d at 143, 145): his constitutional challenge to the court of appeals' efforts to manage its docket in the face of the extraordinary caseload occasioned by the air traffic controller cases was not supported by citation to any legal authorities and was contrary to settled law; his statutory arguments had been rejected in the lead cases and yet were advanced without any effort to distinguish those precedents; and his factual

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[6] Ten of petitioner's appeals arose out of the same MSPB proceeding that produced one of the lead cases, *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). In its lead-case decision in *Adams*, the court of appeals observed that the issues presented by that case appeared to have been decided in the lead cases, and that the other ten appeals would be dismissed unless the court received notification that the appeals would be pursued. Petitioner decided to pursue the appeals, and they were among those found to be frivolous. *Amodeo* v. *Department of Transportation, FAA*, 788 F.2d 1549 (Fed. Cir.), cert. denied, 479 U.S. 849 (1986).

arguments were unsupported by evidence in the record or even by any references to the record, as required by Fed. R. App. P. 28(a)(3) and Federal Circuit Rule 13(a). See generally Pet. App. A143-A145.

The court of appeals in *Des Vignes* then proceeded to review the briefs petitioner had filed in his other air traffic controller cases, which also were before the same panel (791 F.2d at 145-146). It noted that except for a paragraph or two relating to individual controllers, the briefs in 107 of those cases were identical and that the remaining cases were divided into two categories in which the briefs were also essentially identical to one another (*id.* at 145 & n.3). The court observed that "[e]ach [brief] contains the same type of patently frivolous constitutional arguments, rejected contentions, and unsupported assertions of fact" (*id.* at 146) and that "[a]ll 131 briefs reflect violations of the court's rule requiring citation to the record" (*id.* at 145 n.3, 146). The briefs did not attempt to persuade the court that its decisions in the lead cases were wrong; they simply made the same arguments that had been rejected in those cases (*id.* at 144, 146). Moreover, petitioner did not inform the court of appeals that his briefs were identical, thereby forcing the court to review every one to ensure against the possibility that it might contain a meritorious argument (*id.* at 146).

The court in *Des Vignes* also pointed out that petitioner's conduct imposed a substantial burden on government counsel in their representation of the Federal Aviation Administration, the respondent in the court of appeals (791 F.2d at 146):

> Respondent prepared briefs in response to each of counsel's 131 virtually identical briefs. Counsel's failure to refer to the record forced Respondent to do the work incumbent upon counsel. Counsel's failure to supply an appendix in some cases forced Respond-

> ent to do so in those cases. Respondent cited the frivolous, rejected and unsupported contentions discussed above. Respondent also cited counsel's frequent, repeated, and brazen violations of this court's rules. [Petitioner's] reply briefs simply ignored those citations, merely *stating* that the earlier cases were distinguishable (but citing no distinguishing facts), ignored Respondent's charge that he had failed to cite to the record, and stated that the appeal was filed to give Des Vignes access to the court. Faced with clear and insurmountable indication that all 131 appeals were frivolous, [petitioner] has continued to maintain this and the other 130 appeals.

On the basis of these findings, the court held that petitioner's conduct in *Des Vignes* "constitute[d] a flagrant and totally inexcusable abuse of the judicial process," and it therefore ordered petitioner to pay the government a monetary sanction in the amount of $1000 (791 F.2d at 146).[7]

Thereafter, the court of appeals issued decisions in all of the remaining appeals prosecuted by petitioner. It generally found them to be frivolous and imposed monetary sanctions under Fed. R. App. P. 38 totalling $78,300 (plus costs totalling $11,843.94) for such conduct as filing frivolous appeals, abuse of the judicial process, failing even to attempt to distinguish controlling precedent, and violating the court's rules. Petitioner did not contest either the imposition of these sanctions or their amount. Pet. App. A17.

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[7] Petitioner sought review in this Court of the court of appeals' holding in *Des Vignes* that the appeal was frivolous, but the petition for a writ of certiorari was denied. 479 U.S. 853 (1986). As we pointed out in our memorandum in opposition in *Des Vignes*, the certiorari petition was out of time.

3. On January 21, 1987, the court of appeals entered an en banc order requiring petitioner to show cause why he should not be suspended from practice before the court of appeals for two years under Fed. R. App. P. 46(b) for "conduct unbecoming a member of the bar of the court" (App. D, *infra,* 7a-10a).[8] The order recited petitioner's conduct in the air traffic controller discharge cases discussed above and noted that despite the sanctions imposed in those cases, petitioner was subsequently sanctioned for filing three more frivolous appeals in cases that involved the rehiring of controllers (*ibid.*). Petitioner's motion to disqualify all of the judges of the en banc court was denied (Pet. App. A20), and the matter was referred to Senior Judge Bennett for a hearing and recommended decision (*id.* at A20-A21). At the hearing, testimony was received from petitioner's wife and former law partner, three former air traffic controllers, and three expert witnesses on legal ethics. Petitioner did not testify, relying instead on an affidavit he had submitted in support of his motion to disqualify the judges (*id.* at A173).

On December 10, 1987, Judge Bennett issued a written opinion (Pet. App. A1-A99) and extensive findings of fact concerning petitioner's actions (*id.* at A100-A162), in-

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[8] Rule 46(b) provides:

> **Suspension or Disbarment.** When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

cluding an extensive list of examples of individual cases in which the Federal Circuit had imposed monetary sanctions on petitioner (see *id.* at A105-A113). Judge Bennett noted the court's conclusion in *Des Vignes* regarding petitioner's conduct and performance, and he found those conclusions "confirmed by an independent review of [petitioner's] briefs as part of this [disciplinary] proceeding, which indicates, by clear and convincing evidence, that his attempts to comply with the court's notices, rules, and instructions were dramatically deficient in each of the respects" identified in the order to show cause (*id.* at A67). Judge Bennett further found by "clear and convincing evidence" that petitioner's "continued course of conduct in filing and maintaining multiple frivolous appeals in the face of this court's orders, notices, instructions, rules, precedents, and previous sanctions constitutes conduct unbecoming a member of the bar of the United States Court of Appeals for the Federal Circuit" (*id.* at A84-A85). Finding it "certain" that petitioner "was consciously aware of the court's rules and orders regarding overlong briefs, the filing of appendices, citations to the record, and the need to cite and distinguish the lead cases" (*id.* at A92), Judge Bennett recommended that petitioner be suspended from practice before the court of appeals for two years, but that enforcement be suspended pending petitioner's demonstration of good behavior during a period of probation (*id.* at A97).

After receiving petitioner's exceptions to Judge Bennett's findings and recommendations, the court of appeals issued an en banc decision on June 17, 1988, agreeing with and adopting Judge Bennett's determination that petitioner had engaged in conduct unbecoming a member of the bar of the court (Pet. App. A163-A201). The court concluded, however, that the suspension should be for only

one year and that imposition of the suspension should not be delayed beyond the time permitted for filing of a petition for a writ of certiorari (*id.* at A164). The court denied petitioner's petition for reconsideration on July 20, 1988 (*id.* at A202-A206).

ARGUMENT

The court of appeals acted well within its authority in suspending petitioner from practice before that court for a period of one year on the ground that his handling of numerous frivolous appeals and abuse of the judicial process constituted "conduct unbecoming a member of the bar of the court" (Fed. R. App. P. 46(b)). The en banc court's unanimous decision to impose that limited sanction does not conflict with any decision of this Court or of another court of appeals, and it presents no issue of general importance warranting review by this Court.

1. Petitioner first contends (Pet. 23-32) that the appeals he filed were not actually frivolous and that the court of appeals' decision therefore effectively requires lawyers to become gatekeepers for the courts by screening out cases that their clients are entitled to have heard by the courts. This contention is without merit for a variety of reasons.

a. It is too late for petitioner to contend that he did not prosecute frivolous appeals or otherwise engage in conduct that warrants suspension from practice before the court. Prior to the decision of the en banc court of appeals in these proceedings, the court of appeals had *already* made findings on a case-by-case basis in *Des Vignes* and numerous other individual cases that petitioner had pursued frivolous appeals or otherwise engaged in unprofessional conduct, and it had imposed monetary sanctions on petitioner in those individual cases (Pet. App. A17-A18,

A54-A55, A105-A113). This Court denied certiorari when petitioner sought review of the order finding the appeal frivolous and imposing sanctions in *Des Vignes* (see note 7, *supra*), and petitioner did not contest the finding of unprofessional conduct in any of the other individual cases in which monetary sanctions were imposed (Pet. App. A17). Those decisions therefore should properly be regarded as binding on petitioner here. The only question in these proceedings is whether the cumulative effect of this course of concededly unprofessional conduct—in the face of repeated warnings and despite the imposition of monetary sanctions in some cases—warranted the further sanction of suspension from practice before the court of appeals for a period of one year. If we take as a given—as we must for present purposes—that petitioner pursued frivolous appeals or engaged in other improper conduct on the numerous occasions for which sanctions were imposed under Rule 38, then the one-year suspension under Rule 46(b) was patently warranted.

Moreover, petitioner was not suspended from practice before the Federal Circuit solely on the basis of the court's prior findings in the individual cases. Judge Bennett and the en banc court unanimously concluded, on the basis of their *independent* review of petitioner's prior filings and conduct, that petitioner in fact had prosecuted numerous frivolous appeals and otherwise engaged in unprofessional conduct (Pet. App. A65-A70, A182-A184). This confirmation of the prior findings in *Des Vignes* and other cases removes any possible doubt regarding the existence of a factual basis for the suspension.

b. This is not a case, as petitioner claims (Pet. 26, 30), of a court's closing its doors to litigants because of the inconvenience of a heavy caseload. Rather, the court below reasonably determined to manage an extraordinarily heavy docket of closely related cases by adopting a "lead

case" approach that would finally resolve—at least at its level—the controlling legal issues. In order for that procedure to be of any benefit to the court and the parties, it was necessary for the parties to treat the resolution of issues raised in the lead cases as thereafter controlling the resolution, by a panel of the court of appeals, of any identical issues presented in the other cases that were held in abeyance—especially after this Court denied certiorari in the lead cases. It therefore was entirely reasonable for the court of appeals to inform counsel that the parties could not simply ignore the disposition of the lead cases. In any event, petitioner is in no position to question the fairness of this special "lead case" procedure, because he raised no objection when it was first instituted or at any time before the lead cases were decided, and he was the sole counsel in one of the lead cases (Pet. App. A9, A162).

Moreover, the procedure followed by the court below did not prevent counsel from (1) attempting to distinguish their cases from the lead cases on legal or factual grounds, (2) seeking en banc reconsideration of the legal issues that had been decided, or (3) simply acknowledging the court of appeals' precedents and preserving the issues for possible review by this Court. But petitioner followed none of those legitimate courses. Instead, he simply reargued the issues previously decided—disregarding the court's rules and notices, failing to distinguish the lead case authorities, ignoring the authorities cited in the government's briefs, and making factual arguments without citation to the record (Pet. App. A170). There accordingly is no merit to petitioner's suggestion (Pet. 7-9, 26) that the numerous briefs he filed were addressed to questions left open by the decisions in the lead cases.[9] This conclusion is confirmed

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[9] Because none of petitioner's briefs cited to the record below, petitioner cannot argue that he properly raised any factual issues, such as

by the court's exhaustive analysis of petitioner's brief in *Des Vignes*, which was substantially identical to almost all of the other briefs and which demonstrated that petitioner neither attempted to distinguish the lead cases nor acknowledged those adverse precedents and argued for their reversal or modification; he merely repeated the same arguments that a five-judge panel of the court had only recently rejected (Pet. App. A189-A190). Nor, contrary to petitioner's suggestion (Pet. 26), did he prosecute the appeals in a manner that simply preserved the issues for consideration by this Court. He took the position that he was entitled to prevail in the court of appeals, thus requiring government counsel and the court below to examine each and every case and brief that he filed so that any meritorious issue left open by the lead cases would not be overlooked.[10]

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the propriety of consolidation by the MSPB (see Pet. 7). See *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984) (petitioner waived any right he may have had to object to consolidation). Moreover, contrary to petitioner's suggestion (Pet. 8), the appropriateness of the penalty of removal for the offense of participating in the illegal strike was settled by *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984), one of the lead cases. Petitioner's reliance (Pet. 8) on *Brown* v. *Department of Transportation, FAA*, 735 F.2d 543 (Fed. Cir. 1984), for the proposition that there was still doubt on this point after *Schapansky* is completely misplaced, because the offense in that case was not participation in a strike. Finally, while it is true that the decision in *Schapansky* left open the possibility that individual controllers who were absent during the strike could prove facts showing that their absence was not attributable to participation in the strike (see Pet. 8-9), petitioner's briefs did not legitimately raise this issue because they did not cite to supporting evidence in the record.

[10] As Judge Bennett pointed out (Pet. App. A81), only four certiorari petitions were filed in the 154 cases in which petitioner pros-

c. Petitioner erroneously relies (Pet. 15-17, 28 n.8, 31-32) on the views of several experts on legal ethics who testified at the hearing before Judge Bennett on the question of when an appeal should be regarded as "frivolous." Although the court below properly concluded that the responsibility to judge the conduct of members of its bar resides with the court, rather than petitioner's witnesses, it nevertheless observed that the conclusions drawn by petitioner's witnesses were stated in general terms and did not address the specific grounds upon which the court had already found the appeals to be frivolous (Pet. App. A50-A51, A186-A187).

The experts premised their testimony largely on the view that petitioner was obligated to pursue the appeals because his clients insisted that he do so. That proposition, however, is clearly incorrect. The American Bar Association's Model Rules of Professional Conduct (1983), which codify broadly accepted professional standards, prohibit the maintenance of frivolous litigation.[11] Although those Rules do permit a lawyer to make "a good faith argument for an extension, modification, or reversal of existing law" (see note 11, *supra*), when pursuing that course, it is im-

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ecuted appeals on behalf of 736 controllers, and all of those petitions were denied.

[11] Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. * * *

As Judge Bennett's recommended opinion explains, the relevant provisions of the Model Rules of Professional Conduct, which were adopted in 1983, are fully consistent with the corresponding provisions of the superseded Model Code of Professional Responsibility (Pet. App. A32-A38).

perative, as Judge Bennett observed, "that the attorney cite and attempt to distinguish the contrary precedent and provide arguable reasons supporting an extension, modification, or reversal of existing law" (Pet. App. A80). Yet petitioner "consistently did neither" (*ibid.*). Because petitioner's experts focused on the propriety of such legitimate efforts to confront and distinguish countervailing authority, their testimony did not address the conduct in which petitioner actually engaged. In addition, although the Model Rules require a lawyer to represent his client with diligence, that duty does not extend to the use of unlawful or unethical measures.[12] See *In re Bithoney*, 486 F.2d 319, 322 (1st Cir. 1973). As the court below properly concluded, a lawyer may not escape responsibility for his own unethical conduct by asserting that his clients insisted that he engage in it (Pet. App. A187).

d. Petitioner asserts (Pet. 11) that his firm took "appropriate, lawyerly steps" to deal with the problem of filing dozens of briefs within the 60-day period prescribed by the court of appeals after the lead cases were decided. However, that contention ignores the fact that petitioner apparently was able to prosecute the numerous appeals only by flagrantly disregarding the court's rules and

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[12] Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." However, the comment to this rule states that a lawyer "may take whatever *lawful and ethical measures* are required to vindicate a client's cause or endeavor" (emphasis added). Similarly, although Rule 1.2 states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation," it provides only that the lawyer "shall *consult* with the client as to the means by which they are to be pursued" (emphasis added). Thus, as between the lawyer and the client, the lawyer must decide what means are lawful and ethical. The client's authority is limited "by law and the lawyer's professional obligations," and "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Rule 1.2, comment.

notices and by filing "canned" briefs that did not meaningfully address the governing precedents or even acknowledge the individual records upon which the appeals were based. It was not sufficient for counsel to cope as best he could; it was his responsibility not to take on cases that he could not competently handle.[13]

e. Finally, the decision below does not, as petitioner maintains (Pet. 25), require members of the Federal Circuit's bar to serve as its "gatekeepers." The decision below simply enforces the "almost universally recognized" duty of officers of the court to avoid conduct that is "prejudicial to the administration of justice." *In re Synder*, 472 U.S. 634, 645 (1985). It cannot be doubted that filing more than 140 frivolous appeals in the face of repeated warnings was prejudicial to the administration of justice, because it detracted from the court's ability to devote its limited resources to deserving litigants and required unwarranted additional efforts of government counsel in responding to petitioner's submissions. For these reasons, petitioner's conduct was "unbecoming a member of the bar of the court" and properly subjected him to the one-year suspension.

2. Petitioner argues (Pet. 33-40), however, that the suspension was defective because he was entitled to, but did not receive, certain "procedural safeguards"—principally a "neutral and unbiased tribunal" (Pet. 33, 36), by which he means a tribunal other than the court of appeals. However, there is no support for petitioner's contention that it is improper for the court before which an attorney engages in misconduct to make determinations under and enforce Fed. R. App. P. 46. To the contrary, the Rule ex-

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[13] The comment to Rule 1.3 of the Model Rules of Professional Conduct states: "A lawyer's work load should be controlled so that each matter can be handled adequately."

pressly provides for the court itself to take the disciplinary action. See note 8, *supra*. Vesting that responsibility in the court is consistent with the fact that it is the court itself that admits attorneys to practice in the first place, and with this Court's recognition of the inherent power of the federal courts, in the absence of a governing Act of Congress, to regulate the conduct of attorneys and to suspend or disbar an attorney from practice before them. See *In re Snyder*, 472 U.S. 634, 643 (1985); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-379 (1866); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824). Moreover, as Judge Bennett pointed out (Pet. App. A44-A45), the standard procedure in the courts of appeals is for the court itself to make the final determination whether an attorney should be suspended, disbarred, or otherwise disciplined. See *In re Snyder*, 472 U.S. at 638-642; *In re Bithoney, supra*; *In re Tatum*, 587 F.2d 682 (5th Cir. 1979); *In re Chandler*, 450 F.2d 813 (9th Cir. 1971).

Petitioner seeks to bolster his argument that all judges on the en banc court of appeals should have been disqualified by arguing (Pet. 33-36) that disciplinary proceedings are like criminal contempt proceedings, in which disqualification is sometimes required. The two situations are, however, very different. A criminal contempt, to which various procedural safeguards attach, "is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968); accord, *Young* v. *United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987). This Court therefore has held that in some circumstances, where the conduct involves a personal attack on the judge that is likely to leave a personal sting, the contempt proceedings should be presided over by a different judge. See, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488,

501-503 (1974); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Offutt* v. *United States*, 348 U.S. 11 (1954). A proceeding concerning the possible suspension of a lawyer for "conduct unbecoming a member of the bar of the court" is quite different from a criminal prosecution. Such a proceeding focuses on the individual's adherence to the widely accepted standards of his profession, including the avoidance of conduct that is inimical to the administration of justice (*In re Snyder*, 472 U.S. at 645), and a proceeding concerning the possible suspension or disbarment of an attorney is an aspect of the court's broad regulatory power over the attorneys who practice before it. It therefore is untenable to suggest that all judges of the particular court must be disqualified from participating in an attorney disciplinary proceeding. Moreover, even in cases of criminal contempt, there is no absolute rule barring the judge who presided in the underlying proceeding from also presiding in the contempt proceeding, if the conduct does not personally embroil the judge. Here, petitioner's unprofessional conduct was not personally directed to any of the judges of the court of appeals, and therefore would not require the disqualification of those judges even if the principles of the contempt cases were fully applicable in this setting.

b. There is no basis for petitioner's underlying premise that the court below was partial or biased in some manner. There is, for example, no evidence that the court of appeals had prejudged the question whether petitioner should be suspended from practice before that court. All evidence is to the contrary. The court appointed a respected senior judge, who had not previously been involved in the air traffic controller appeals, to take evidence and issue a recommended decision,[14] and petitioner par-

[14] There is no indication that Judge Bennett considered himself bound by the court's previous conclusions regarding the frivolous

ticipated in a full evidentiary hearing at which none of his evidence was excluded (Pet. App. A22). Petitioner also exercised his right to take exceptions to Judge Bennett's recommended decision, and the court addressed and responded fully to each of his arguments—both initially and on reconsideration. In the absence of any concrete evidence of bias, petitioner's argument that disqualification was required in this case, if carried to its logical conclusion, would lead to the disqualification of all judges in all matters relating to sanctions for misconduct in the course of litigation, because of a supposition of bias.[15] That simply is not the law.

c. Relying on an analogy to an increase in a penalty on appeal, petitioner maintains (Pet. 38-39) that the en banc court impermissibly imposed a "more severe" penalty by rejecting Judge Bennett's recommendation that the suspension be deferred pending petitioner's demonstration of good behavior. This contention is without merit. The order to show cause made it clear that the court would

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nature of petitioner's appeals; to the contrary, Judge Bennett stated that he made an "independent review" of the briefs petitioner filed in order to determine whether they were frivolous (Pet. App. A67). In any event, as explained above (see pages 10-11, *supra*), Judge Bennett would not have been wrong to have regarded himself as bound by the court's prior determinations. Contrary to petitioner's assertion (Pet. 38), those findings were made in adversary proceedings. In each of the briefs it filed in those individual cases, the government argued that the appeal was frivolous and requested that sanctions be imposed. Although petitioner did not respond to those contentions, he clearly had an opportunity to do so.

[15] See, *e.g.*, Fed. R. App. P. 38 (damages for delays caused by frivolous appeals); Fed. R. App. P. 30(b) (sanctions against counsel for unreasonably increasing the cost of litigation); Fed. R. Civ. P. 11 (sanctions for violation of requirements that pleadings be well grounded in fact and law, etc.); Fed. R. Civ. P. 16(f) (sanctions for failing to obey pretrial orders, etc.).

determine the appropriate sanction and that Judge Bennett's role was that of a master assigned to take evidence and recommend a course of action. Petitioner was clearly on notice, as of the date of the show cause order, that he risked being suspended from practice before the court for a period of two years.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. AYER
*Acting Solicitor General**
JOHN R. BOLTON
Assistant Attorney General
DAVID M. COHEN
SANDRA P. SPOONER
Attorneys

DECEMBER 1988

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[16] In any event, as a result of petitioner's request for reconsideration, the en banc court considered all of his arguments in favor of the sanction proposed by Judge Bennett, and rejected them (Pet. App. A206).

* The Solicitor General is disqualified in this case. Although counsel for the government did not participate in the proceedings in the court of appeals leading to petitioner's one-year suspension, we deem it appropriate to file a response to the certiorari petition in the name of the United States, on behalf of the court of appeals, in light of the fact that an agency of the federal government was the opposing party in the individual cases in which petitioner was found to have engaged in unprofessional conduct and the government sought sanctions in those individual cases. The court of appeals requested this Office to file a response to the certiorari petition, but it has not reviewed the content of this brief.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re

AIR TRAFFIC CONTROLLERS LITIGATION

Before FRIEDMAN, RICH, and DAVIS, *Circuit Judges.*

[Filed Feb. 24, 1983]

ORDER

There are pending before the court more than 225 petitions for review by former air traffic controllers challenging decisions of the Merit Systems Protection Board (the Board) sustaining the discharge of the controllers by the Federal Aviation Administration (the Administration) for participation in an illegal strike in August 1981. In most of the cases the petitioners filed suit in this court following decisions of various regional offices of the Board and did not ask the Board itself to review the cases. In two of the cases, however, the petitioners sought review by the Board of regional office decision and then filed petitions to review the final Board decisions in this court.[1]

The various cases raise a number of issues, including challenges to both the Administration's discharge of the controllers and the Board's affirmance of that action.

In addition to the cases before the court, the Board advises that it has pending more than 1,500 cases challenging

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[1] *Schapansky* v. *Department of Transportation*, Appeal No. 83-663; *Johnson* v. *Department of Transportation*, Appeal No. 83-664.

decision[s] of its regional offices. The Board will review five of those cases on an expedited basis as "lead cases,"[2] and it is expected that we will review Board decisions in those five cases. The decisions of this court in those five cases and the two cases already before us that the Board itself has reviewed are expected to determine most, or perhaps all, of the legal issues in the air traffic controllers litigation.

On February 15, 1983, we suspended proceedings in three of the cases before us in which the petitioners directly challenged the decisions of the Board regional offices but did not seek review by the Board.[3] We did so because, in view of the large number of cases, it is appropriate that this court first determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases.

We conclude that we should follow the same practice in the remaining cases until the seven lead cases finally have been determined.

Accordingly, IT IS ORDERED THAT:

1. All appeals from the Board, except for the seven cases listed in footnotes 1 and 2, in the Air Traffic Controllers litigation now pending before this court are stayed pending final disposition of those seven cases.

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[2] *Richard T. Adams, et al.* v. *Federal Aviation Administration,* MSPB No. NY075281F0347; *Kipp C. Anderson* v. *Federal Aviation Administration,* MSPB No. SL075281F0347; *Gary S. Baracco* v. *Federal Aviation Administration,* MSPB No. DC075281F0895; *Robert L. Campbell* v. *Federal Aviation Administration,* MSPB No. DE075281F0697; and *Joseph R. Noa (Richard E. Golle, et al.)* v. *Federal Aviation Administration,* MSPB No. NY075281F0697.

[3] *Thomas R. Ferrando* v. *United States,* No. 83-687; *John M. Erickson* v. *United States,* No. 83-688; and *Michael J. Zullo* v. *United States,* No. 83-689.

2. The Board is to withhold transmission of the certified lists normally submitted to the court in lieu of the record.
3. Pending disposition of the seven cases, the Clerk of this court is directed to retain in a suspense file all pending petitions for review filed by Air Traffic Controllers, with accompanying fees, and to withhold docketing of any petition as an appeal.

APPENDIX B

NOTICE TO COUNSEL AND PETITIONERS IN AIR TRAFFIC CONTROLLER LITIGATION

Enclosed are opinions in the Air Traffic Controller "Lead Cases".

The suspension entered by the Court on February 24, 1983 in all other Air Traffic Controller cases will remain in effect until final disposition of all the "Lead Cases."

You will be notified upon final disposition of all "Lead Cases." Within 30 days from the date of that notification you must notify this court in writing if you want to prosecute your appeal. If you do not so notify the court, your appeal will be dismissed. Retained filing fees will be returned.

The court has directed attention to the prosecution of frivolous appeals. *Wright v. United States*, 728 F.2d 1459 (1984); *Beachboard v. United States*, 727 F.2d 1092 (1984); *Connell v. Sears*, 722 F.2d 1542 (1983); and *Asberry v. United States*, 692 F.2d 1378 (1982).

May 18, 1984

/s/ GEORGE E. HUTCHINSON
George E. Hutchinson, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

GEORGE E. HUTCHINSON
CLERK

TELEPHONE 633-6550
AREA CODE 202

NOTICE TO COUNSEL AND PETITIONERS IN AIR TRAFFIC CONTROLLER LITIGATION

The Supreme Court has completed final disposition of all "Lead Cases" and mandates have been issued in those cases to the Merit Systems Protection Board.

In accord with this court's notice of May 18, 1984, you are hereby notified that:

(1.) The suspension entered on February 24, 1983 will remain in effect to and including January 10, 1985. Before that date you must withdraw your present petition for review or file a renewed petition. If you do neither, your petition will be dismissed.

(2.) Any renewed petition must include a statement of the issues relied on and not decided in any of the "Lead Cases".[1]

(3.) Checks received with the initial petition are being returned with this notice. If you file a new petition, you must enclose a new check for the $65.00 filing fee.

(4.) The Court again directs attention to the impropriety of frivolous appeals. *Asberry v. United States*, 692 F.2nd 1378 (1982); *Connell v. Sears*, 722 F.2nd 1542 (1983); *Beachboard v. United States*, 727 F.2d 1092 (1984); and *Wright v. United States*, 728 F.2d 1459 (1984).

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[1] The "Lead Cases" can be found in 735 F.2d, pages 477 through 549.

(5.) If you file a new petition, on or before January 10, 1985, your appeal will be docketed on receipt of that petition. You must file your brief within 60 days thereafter.

(6.) If you file a new petition, a certified list will not be required. If need arises, the list of documents of record may be ordered by the court, on motion or *sua sponte.*

(7). The Court will not act on motions of respondent to dismiss or for summary affirmance in relation to a new petition until petitioner's brief/appendix has been filed.

FOR THE COURT

December 10, 1984

/s/ GEORGE E. HUTCHINSON
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Misc. No. 145

In re

JACK B. SOLERWITZ

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, DAVIS, SMITH, NIES, NEWMAN, BISSELL and ARCHER, *Circuit Judges.*

[Filed Jan. 21, 1987]

ORDER

On May 18, 1984, this court sent a "Notice to Counsel and Petitioners in Air Traffic Controller Litigation". That notice enclosed copies of opinions in the precedents of this court referred to as the Lead Cases and directed attention to the impropriety of maintaining frivolous appeals, citing published opinions of this court on that subject.

On December 10, 1984, this court again sent a "Notice to Counsel and Petitioners in Air Traffic Controller Litigation". That notice informed recipients that the Supreme Court had completed final disposition and mandates had issued in all Lead Cases, and that all pending petitions would be dismissed unless withdrawn or replaced with a new petition, stating "[a]ny renewed petition must

include a statement of the issues relied on and not decided in any of the 'Lead Cases.' " That notice also gave the citations for the Lead Cases, and emphasized the impropriety of frivolous appeals, citing published opinions of this court on that subject.

The above-described Notices were sent to Jack B. Solerwitz, Esquire. In addition, on July 12, 1985, July 31, 1985, and August 30, 1985, this court wrote Mr. Solerwitz requesting that he review the propriety of maintaining his appeals in light of the need to avoid frivolity and the accompanying abuse of the judicial process.

Mr. Solerwitz was thus repeatedly and expressly warned by this court against filing and maintaining frivolous appeals in air traffic controller cases that presented legal issues and fact patterns indistinguishable from those presented and decided in the precedents represented by the Lead Cases. Ignoring those warnings, Mr. Solerwitz, who was sole counsel in one Lead Case, maintained 11 frivolous appeals pending on May 18, 1984 and filed and maintained another 131 separate frivolous appeals in air traffic controller cases. In his briefs in those appeals, 107 of which were virtually identical, Mr. Solerwitz disregarded Federal Rules of Appellate Procedure and this court's rules, failed to file appendices, provided no citations to the record, ignored authorities cited by the government, advanced numerous arguments on issues not on appeal, and repeatedly raised contentions not raised before the Merit Systems Protection Board. Mr. Solerwitz' briefs were devoid of any showing on which the decision appealed from could even possibly be reversed, devoid of any basis on which the precedents of this court could be distinguished in law or fact, and devoid of any effort to make such distinctions, in total disregard of this court's written instructions of December 10, 1984.

Despite repeated warnings and imposition of sanctions totalling $74,500, Mr. Solerwitz continued his improper pattern of conduct before this court. In three air traffic controller "rehiring" cases, Mr. Solerwitz filed appeals and had sanctions imposed because those appeals were frivolous.

Mr. Solerwitz filed and maintained an appeal in a non-air traffic controller case for which a sanction was imposed.

Mr. Solerwitz' conduct in filing and maintaining frivolous appeals having no colorable basis in fact or law has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process. Mr. Solerwitz' conduct has been "unbecoming a member of the bar of the court", Fed. R. App. P. 46(b). *See e.g., In re Snyder*, 105 S.Ct. 2874 (1985); *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973).

Accordingly, IT IS ORDERED:

(1) That Jack B. Solerwitz, Esquire, by written answer filed within thirty days from the date of this order, show cause why he should not be suspended for two years from representing clients before this court.

(2) That said answer shall state whether Mr. Solerwitz desires oral argument or evidentiary hearing.

(3) That any oral argument or evidentiary hearing shall be strictly limited to the above-described conduct of Mr. Solerwitz.

(4) That Mr. Solerwitz complete and return within said thirty days, the attached "Declaration of Admission

to Practice" form. Waiver of answer does not remove the necessity of completing and returning the attached form.

FOR THE COURT

Jan. 21, 1987
Date

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

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